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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

GEORGE F. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Acting Solicitor General.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A18-A24)
is reported at 538 F. 2d 128.

JURISDICTION

The judgment of the court of appeals was entered on July 23,
1976. A petition for rehearing was denied on October 20, 1976
(Pet. App. A25). The petition for a writ of certiorari was filed
on December 16, 1976. The jurisdiction of this Court is invoked
under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's sentence on one count of the indictment
exceeded the maximum allowed by statute.

STATEMENT

Following a jury trial on three separate indictments in
the United States District Court for the Eastern District of
Tennessee, petitioner was convicted of transporting firearms and
ammunition in interstate commerce after having been convicted of a
felony, in violation of 18 U.S.C. 922(g) and 924; possessing
unregistered firearms and destructive devices, in violation of
26 U.S.C. 5861(d) and 5871; knowingly retaining stolen United
States postal money orders, in violation of 18 U.S.C. 641; and

possessing, with intent to defraud, falsely made United States postal money orders, in violation of 18 U.S.C. 472. He was sentenced to a total of 20 years' imprisonment.^{1/} His conviction was affirmed on appeal (451 F. 2d 167).

Almost four years later, in November 1974, petitioner filed a motion to vacate his sentence, pursuant to 28 U.S.C. 2255, contending that the ten year sentence of imprisonment imposed on his conviction for transporting firearms in interstate commerce was in excess of the five year maximum authorized by 18 U.S.C. 924(a).^{2/} The district court denied relief, holding that since the evidence adduced at trial showed that petitioner had carried firearms during the commission of a felony, the penalty provisions of either 18 U.S.C. 924(b) (transportation of firearms or ammunition in interstate commerce with intent to commit a felony) or 18 U.S.C. 924(c)(2) (carriage of a firearm during the commission of a felony), both of which authorize a sentence of ten years' imprisonment, were applicable (Pet. App. A9-A11). The court of appeals affirmed (Pet. App. A13-A24).

The undisputed evidence at trial is detailed in the opinion of the court of appeals (Pet. App. A18-A20). In summary, it showed that on February 3, 1970, petitioner unsuccessfully attempted to cash certain United States postal money orders in the First National Bank in Port Joe, Florida. He thereafter left the bank and drove away in an automobile bearing Missouri license plates. Two days later, on February 5, 1970, petitioner was seen driving the automobile bearing the same Missouri license plates

1/ On the first indictment, petitioner was sentenced to two years' imprisonment for possessing a firearm, after having been convicted of a felony (count one) and ten years' imprisonment for transporting firearms and ammunition in interstate commerce (count two), the sentences to run consecutively. (The district court, on collateral attack, subsequently set aside the conviction on count one (Pet. App. A-1)). On the second indictment, charging possession of unregistered firearms, petitioner was sentenced to eight years' imprisonment, to run consecutively to the above sentences. On the third indictment, charging the postal money order offenses, petitioner was sentenced to ten years' imprisonment on each of two counts, to run concurrently with each other and with the sentences imposed on the counts of the first indictment. Petitioner's present challenge involves only the sentence imposed on count two of the first indictment, charging a violation of 18 U.S.C. 922(g) and 924.

2/ On direct appeal, petitioner did not attack the sufficiency of the indictments or question the propriety of the sentences. His sole (continued)

at an excessive rate of speed in the State of Tennessee and was pursued by a Tennessee State Trooper. Following a high speed chase, petitioner crashed the car into a police cruiser that had been set up as part of a road block and was arrested.

In a briefcase in the trunk of petitioner's wrecked car, the police discovered \$38,000 worth of money orders that had been stolen in three separate burglaries of post offices in Missouri, Kentucky, and Tennessee. In each of these burglaries, the safes containing the money orders had been blown open with explosives. In addition to the stolen money orders, the police found an arsenal of guns, ammunition, blasting gelatin, blasting caps and fuses in the trunk of the car.

DISCUSSION

Petitioner contends that the district court erred in sentencing him to a term of imprisonment that exceeded the statutory maximum for the offenses with which he was charged. Count two of the first indictment alleged in pertinent part (Pet. App. A26-A27):

[O]n or about the 5th day of February, 1970, in the Eastern District of Tennessee, Northern Division, GEORGE FINIS GARNER did willfully and knowingly transport and ship in interstate commerce from the State of Florida to Blount County, Tennessee, firearms and ammunition, * * * the same George Finis Garner at that time having previously been convicted of a crime punishable by imprisonment for a term exceeding one year. (Title 18, Sections 922(g) and 924, United States Code.)

Although 18 U.S.C. 924(a) provides that the maximum penalty for a violation of Section 922(g) is five years' imprisonment, the district court sentenced petitioner to ten years in prison on this count. When this discrepancy was raised in petitioner's motion

2/ (continued) contention related to the search of his car and seizure of the contraband following his arrest (451 F. 2d 167, 169). Petitioner's first collateral attack on his conviction was filed on December 26, 1973, when he moved to vacate both convictions under the first indictment, alleging that count one failed to charge an interstate nexus and that the government had not proven an interstate nexus in count two. The district court granted his motion as to count one but denied it as to count two (the court challenged here), and petitioner appealed. On January 8, 1975, the court of appeals vacated the judgment of the district court as to the conviction under count two and remanded the cause for consideration in light of petitioner's second Section 2255 motion, filed on November 24, 1974, which contended that the sentence on count two was invalid because it exceeded the maximum period authorized by statute.

to vacate his sentence, the court observed that "it did not err in sentencing petitioner to ten years under Count II because the penalty provisions of Section 924(b) or (c)(2) were clearly applicable to this case" (Pet. App. A10). The court of appeals agreed, stating (*id.* at A23-A24):

If Count Two of the indictment had indicated that [petitioner] was charged under Title 18 U.S.C.A. § 924(b) or (c)(2), instead of simply under 18 U.S.C.A. § 924, there would be no basis for argument as to the illegality of sentencing. However, as heretofore stated, the Government contended and its proofs showed that [petitioner] had committed the offense under § 924(b) or (c)(2). As the District Court remarked, [petitioner] was represented by counsel who were able and experienced in the trial of criminal cases, and no objection was raised as to the applicable penalty provisions before trial, during trial, or at sentencing. The mere fact that the Grand Jury charged [petitioner] in the indictment with violation of Title 18 U.S.C.A. § 924, instead of § 924(b) does not invalidate the sentence under the latter provision of § 924, where the evidence was introduced by the Government in support of the charge under this count, and no objection was made during the trial to evidence in support of such count, nor any objection at the time of sentencing thereunder.

Although the decisions of the courts below on petitioner's Section 2255 motion substantially reflected arguments that had been presented by the government, we have concluded after further consideration that petitioner's sentence on count two of the first indictment must be set aside and that he must be resentenced to no more than five years' imprisonment on that count. The district court and the court of appeals incorrectly assumed that the only defect in these proceedings was the statement in the indictment that petitioner had been charged with violating 18 U.S.C. 924 rather than specifying subsections (b) or (c)(2) of Section 924. We would agree that, under such circumstances, any lack of specificity in the citation in the indictment would not entitle petitioner to relief on collateral attack, at least in the absence of a clear showing of prejudice. See Fed. R. Crim. P. 7(c)(3).

We believe, however, that the error in this case was more fundamental. 18 U.S.C. 924(b) and (c)(2) are separate offenses rather than enhanced punishment provisions, and the elements of

those crimes must be charged in the indictment before convictions thereunder may be obtained. Cf. United States v. Howard, 504 F. 2d 1281, 1286 (C.A. 8); United States v. Ramirez, 482 F. 2d 807, 813 (C.A. 2), certiorari denied, 414 U.S. 1070; United States v. Vigil, 458 F. 2d 385, 386 (C.A. 10). The count in question charged petitioner neither with transporting firearms and ammunition in interstate commerce with intent to commit a felony (18 U.S.C. 924(b)) nor with transporting those materials during the commission of a felony (18 U.S.C. 924(c)(2)). The count simply made no mention of any felony related to the transportation of the firearms, as we believe it must have done in order to charge an offense under Section 924(b) or 924(c)(2). Thus, while the evidence plainly showed that petitioner in fact committed those crimes, he could not have been convicted of or sentenced for either offense because he was not indicted for them.

Count two charged petitioner with transporting arms and ammunition in interstate commerce after having been convicted of a felony, in violation of 18 U.S.C. 922(g). As previously noted, the maximum penalty for that offense is five years' imprisonment. See Mauney v. United States, 454 F. 2d 273, 274 (C.A. 6). Accordingly, we do not oppose a grant of the petition for the purpose of reversing the judgment of the court of appeals and remanding the case to the district court with instructions to correct the sentence on that count.

Respectfully submitted.

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